



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

#9 Appeal
Brief
SC
6/11/03

In re Application of:

RAYMOND ZAPPE : May 20, 2003

Serial No. 10/077,346 : Group Art Unit 3612

Filed: 2/14/02 : Examiner: HILARY L. GUTMAN

For: LINER APPARATUS AND METHOD OF MAKING A LINER

BRIEF FOR APPELLANT

Commissioner for Patents

P O Box 1450

Alexandria VA 22313-1450

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This Brief is filed pursuant to the provisions of 37 C.F.R. 1.192 and M.P.E.P. 1206.



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REAL PARTY IN INTEREST

Applicant is the real party in interest.

RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences.

STATUS OF CLAIMS

Claims 1-27, are pending in this application.

Claims 1-20, method claims, have been withdrawn from consideration by way of an election without traverse following a restriction requirement. Those claims will be canceled in due course and will be included in a divisional application.

Claims 21-27 are the only claims under consideration in this appeal.

Claim 21 is an independent claim, and claims 22-27 are dependent claims.

STATUS OF AMENDMENTS

An Amendment A was filed, rewriting independent claim 1 and making some corrections to the specification.

An Amendment B was filed subsequent to the final rejection, and was entered. The purpose of the Amendment was to rewrite the Abstract of the Disclosure. No claims were amended. The Amendment was entered.

SUMMARY OF THE INVENTION

The present invention comprises a three or four layered bed liner for a truck. This is best shown in Fig. 4, but may also be understood from the method steps illustrated in Figs. 1, 2, and 3. The bed liner includes a base coat 80, a patterned coat 82 disposed on and secured to the base coat 80, and a clear top coat 84 disposed on and secured to the patterned coat 82. The clear top coat 84 allows the patterned coat 82 to be viewed. The base coat may be a foam backing coat, as shown in Fig. 3. A fourth clear layer may be added if desired. The fourth clear layer is illustrated in Fig. 2.

Methods of making the liner, illustrated in Figs. 1, 2, and 3, and defined in claims 1-20, are not under consideration in this Appeal, as indicated previously in the Status of Claims portion of this Brief.

ISSUES

The following issues are presented in this Appeal:

1. Whether claims 21 and 25-26 are patentable under 35 U.S.C. §102(b) over U.S. Patent 5,083,830 (Mucher et al).
2. Whether claims 21, 23, 24, and 27 are patentable under 35 U.S.C. §103(a) over U.S. Patent 5,083,830 (Mucher et al).
3. Whether claims 21 and 23 are patentable under 35 U.S.C. §103 (a) over U.S. Patent 5,083,830 (Mucher et al) in view of U.S. Patent 5,470,642 (Egigian).
4. Whether claims 21, 22, 24, 26, and 27 are patentable under 35 U.S.C. §103(a) over U.S. Patent 6,142,550 (Blyth et al).

GROUPING OF CLAIMS FOR EACH GROUND OF REJECTION

- 25*
- (a) Claims 21, ~~26~~-26: Rejected under 35 U.S.C. §102(b) over Mucher et al.
 - (b) Claim 22: Rejected under 35 U.S.C. §103(a) over Mucher et al in view of Egigian.
 - (c) Claims 23, 24, and 27: Rejected under 35 U.S.C. §103(a) over Mucher et al.
 - (d) Claims 21, 22, and 24-27: Rejected under 35 U.S.C. §103(a) over Blyth et al.

ARGUMENTS

The following arguments are set out corresponding to the Issues identified above.

1.

The standard for a 35 U.S.C. §102(b) rejection is set forth as follows:

For a prior art reference to anticipate in terms of 35 U.S.C. §102, every element of the claimed invention must be identically shown in a single reference.... These elements must be arranged as in the claim under review...In re Bond, 910 F.2d 831, 15 U.S.P.Q.2d 1566 (Fed Cir. 1990).

That standard has been the legal standard for many years, and is indisputable.

The reference relied on for the 35 U.S.C. §102(b) rejection is the Mucher et al '830 patent. The Mucher et al '830 patent is for a pickup truck bed apparatus having a pocket for receiving a decorative insert. The Abstract of the Disclosure includes the following: "... (A) bottom floor spaced from a top floor defining a pocket therebetween." (Emphasis added)

In column 2, lines 32-35, the following is stated as one of the objects of the invention: "(A) new and improved truck bed insert wherein the same selectively receives a plate member between spaced floors of the insert..." (Emphasis added)

For clarification, what is referred to in the present application as a bedliner is referred to as an insert in the Mucher et al '830 patent. Thus, the truck bed insert 10 of Mucher et al '830 corresponds generally, but not structurally, of course, to the bedliner of the present invention.

Claim 21 under consideration herein comprises a bedliner having three elements, a base layer, a patterned second layer secured to the base layer, and a clear third layer secured to the patterned layer.

Note that the three layers are secured together. The layers of Mucher et al '830 are not secured together. The Mucher et al structure repeatedly states that a pocket is formed of two spaced apart layers, and a plate is inserted into the pocket.

In the Mucher et al embodiment of Fig. 9, discussed in column 4, lines 1-19, a single unitary floor 42 is discussed. The unitary floor 42 consists of a single layer. The unitary floor 42 is transparent so that graphics may be viewed through the floor 42. The graphics may be positioned beneath the unitary floor 42 by individuals. That is, individuals, users of the truck, may position graphics on the truck bed beneath the single layer, or unitary layer, floor 42. That structure is completely different from the structure defined in claim 21.

There is no teaching or even a remote suggestion in the '830 patent that three layers may be secured together. Accordingly, the Mucher et al '830 patent is not a proper reference under 35 U.S.C. §102(b) for the rejection of independent claim 21.

As for the term “secured,” as used in the present application, the Examiner states that the Mucher et al layers are “inherently secured” together, otherwise the patterned layer or plate would fall out! And the patterned layer is “inherently” secured to the clear layer in order to permit the patterned layer to be viewed. The Examiner completely ignores the reality of the Mucher et al structure, the plain language of the Mucher et al specification, and ignores the term “secured” as used in the present specification and claims. In plain language, the Mucher et al plate 20 is simply inserted into the pocket or cavity 19. This is clearly shown in Fig. 5 and is discussed thoroughly in column 3. And, incidentally, the Examiner ignores the reality of pickup trucks, such as the presence of a tailgate to maintain cargo, etc., on the pickup bed, which would certainly prevent the Mucher et al plate from coming out of its pocket, if that were really an issue with the Mucher et al structure.

The Examiner further states that the Mucher et al patent inherently discloses layers secured together for the preservation of the bedliner. Again, the Examiner’s definition of “secured” is inherently incorrect. There is no basis in fact for the Examiner’s analysis of the Mucher et al structure as compared to the structure of the present invention. Nowhere in the Mucher et al ‘830 patent is the term “secured” or its equivalent used in regard to the three layers of the Mucher et al structure. The reason is obvious: Mucher et al is not concerned with securing the three layers together. A pocket or cavity 19 is formed by spacing apart the top and bottom layers 18, 17, respectively, and then the intermediate, or patterned, layer or

plate 20 is merely placed into the formed pocket or cavity 19. The Mucher et al structure is accordingly different from the structure of the present apparatus.

The Examiner also ignores the definition of the term “flexible” as used in the present application and claims, glossing over it by stating that the Mucher et al structure “is relatively ‘flexible’ as broadly interpreted in that the patterned layer can be readily removed and replaced....” The Examiner’s comparative definition of “inflexible” is correct by stating that the Mucher et al structure does not bend. However, the Examiner’s definition of “flexible” is, of course, absolutely incorrect. There is no basis for “broadly” defining “flexible” as the Examiner has done.

2.

For an obviousness rejection, there must be some suggestion or motivation to combine or modify. See In re Sernaker, 702 F.2d 989, 217 U.S.P.Q. 1 (Fed. Cir. 1903); in re Gordon, 733 F.2d 900, 221 U.S.P.Q. 1125 (Fed. Cir. 1984). Furthermore, hindsight should be avoided. That is, the Examiner should not use the present invention as a blueprint. Panduit corp. v. Dennison Mfg. Co., 774 F.2d 1082, 227 U.S.P.Q. 337 (Fed. Cir. 1985), remanded, 475 U.S. 809, 229 U.S.P.Q. 478 (1986), on remand, 810 F.2d 1561, 1 U.S.P.Q. 2d 1993 (Fed. Cir. 1987), Cert. Denied, 481 U.S. 1052 (1987); Interconnect Planning Corp. v. Feil, 774 F.2d 1132, 227 U.S.P.Q. 543 (Fed. Cir 1985); In re Fine, 837 F.2d 1071, 5

U.S.P.Q. 1596 (Fed. Cir. 1985); In re Newell, 891 F.2d 899, 13 U.S.P.Q. 2d 1248 (Fed. Cir. 1989); in re Dembiczak, 175 F.3d 994, 50 U.S.P.Q. 2d 1614 (Fed. Cir. 1999).

Without even a suggestion of three layers secured together, the Mucher et al '830 patent is not a proper reference for the rejection of claims 21-27 under 35 U.S.C. §103(a). Absent the teachings of the present application for providing three layers secured together, nothing in the '830 patent suggests such structure. In other words, the structures defined in claims 21-27 are not obvious in view of the Mucher et al '830 patent under 35 U.S.C. § 103(a).

What the Mucher et al '830 patent teaches is that two layers of material with the top layer clear, may be spaced apart to define a pocket or cavity, and that a patterned plate may be inserted into the pocket or cavity. The patterned plate may be removed and replaced by another patterned plate. Those teachings are inapposite to the structure of the present invention as defined in claim 21. The Mucher et al structure accordingly cannot be modified to suggest the structure of the present invention defined in claim 21.

3.

The Egigian '642 patent discloses a resilient pad 100 for installation in a pickup truck bed underneath a bedliner. (Emphasis added) The pad 100 is referred to as a paint saver pad. That is, the purpose of the resilient pad 100 is to act as a cushion beneath a bedliner to protect the truck's paint from wear and tear.

Nothingⁱⁿ is Egigian '642 suggests that the resilient pad may be secured to the bedliner as a bottom layer thereof. Accordingly, the only logical teaching of Egigian '642, with respect to the Mucher et al '830 patent is that a resilient pad may be disposed beneath the insert apparatus 10 of Mucher et al. Such combined teachings do not provide the basis for rejection in claim 22 (and claim 21) under 35 U.S.C. §103(a), even assuming, without admitting, of course, that the Mucher et al '830 patent is the basis of a proper 103(a) rejection of independent claim 21, the parent claim for claim 22.

4.

Finally, we look at the Blyth et al '550 patent. Blyth et al discloses a glass reinforced liner or enclosure 20 for a van, or, as applied to the present invention, for a pickup truck bed. The purpose of the entire enclosure 20 is stated to "insulate and maintain the temperature within the cargo area of a transport van." See column 1, lines 28-30. For purposes of the present invention, the Blyth et al structure includes two floor panels, a front floor panel 3 and a rear floor panel 4.

The rear floor panel 4 has a rear edge outside notch 86. See column 3, lines 104, and Figs. 3a and 3b.

Notch 92 is molded around front floor panel 3. See Figs. 6a and 6b, and column 3, lines 35-38.

The notch 92 of the front floor panel 3 and the notch 86 of the rear floor panel 4 abut or overlap each other to secure the two panels (and their respective adjacent panels) together as may be understood from Fig. 9. See column 4, lines 43-51. See also column 5, lines 3-7.

The structure of the panels comprise essentially three portions. The outside of the panels is composed of a high density extruded polystyrene foam and the inner surface of the panels is composed of a gel coat finish stiffened with intermediate layers of chopped glass mat saturated with catalyzed resin.

The outside of the "moulded GRP" (Glass Reinforced Plastic) sections are made of 2½" high density extruded polystyrene foam. The inner surface of the van liner has a bright white gel coat finish stiffened with three layers in the floor section of 1½ oz. chopped glass mat saturated with catalyzed resin. See column 4, lines 10-15.

Contrary to the assertion of the Examiner, the floor panels do not have either a patterned layer or a clear layer. The reason is obvious: The purpose of the Blyth et al structure is to provide an insulative liner for the interior of a van. The insulation is provided by the relatively thick foam layer. The purpose of the resin impregnated chopped glass layers is to provide reinforcing, not decoration, for the white, not clear, gel coat.

As is understood by anyone familiar with such structural materials, the foam is relatively soft and would be easily damaged by cargo carried in the van. Accordingly, resin impregnated chopped glass is used to provide strength, not decoration, between the relatively soft insulating foam and the white, not clear, gel coat.

Now, absent the teachings of the present invention, what are the teachings of Blyth et al '550 patent which may be applied under 35 U.S.C. §103(a) to the present invention? Essentially, the teachings of the '550 patent boil down to (1) that the inside of a van may be covered with interlocking panels; (2) that such panels may be made of layers; and (3) that the layers may include a white gel coat layer, an insulative foam layer, and a reinforcing layer or layers of resin impregnated chopped glass between the gel coat layer and the insulative foam layer.

A person of ordinary skill in the pertinent art of the Blyth et al structure understands that the polystyrene foam is first sprayed with a protective coat of paint for protection against the resin in the chopped glass. The ordinary skilled person also understands that the relatively soft polystyrene needs reinforcing protection, and hence the need for the resin impregnated chopped glass. After the paint dries, the resin impregnated chopped glass layers are sprayed onto the protected polystyrene foam for reinforcement, and then the resin impregnated chopped glass layers are cured. After the reinforcing resin impregnated chopped glass layers are cured, the gel coat is sprayed on the layers of chopped glass. There is no hint of anything in the '550 patent that the inventors are interested in anything other than providing straight forward insulation panels for a van. No decorations or decorative items are even remotely suggested.

What is not taught by the blyth et al '550 patent? Nothing in Blyth et al suggests that a clear layer may be provided over a patterned layer in a truck bedliner! The terms “clear”

and “patterned” or their equivalents are never used in the ‘550 patent. Nothing in the ‘550 patent suggests that resin impregnated chopped glass may be considered as a patterned layer! And certainly nothing in the ‘550 patent suggests that a white gel coat layer may be considered as a clear layer.

It is only by applying the teachings of the present invention and then using the fertile imagination of the Examiner that resin impregnated chopped glass may be considered a patterned layer! Such reasoning is, of course, patently absurd. Moreover, again only in the fertile imagination of the Examiner may a clearly defined white gel coat layer be considered as clear layer!

The resin impregnated chopped glass is always, and only, referred to in the ‘550 patent as reinforcing material. There is no teaching or suggestion in the Blyth et al ‘550 patent for providing anything but an insulative liner for a van!

And, with respect to the Examiner’s interpretation of “flexible,” the above comments regarding the term are also pertinent here.

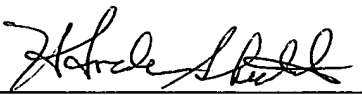
Accordingly, the Blyth et al ‘550 patent is not a proper reference for the rejection of the claims in the present application under 35 U.S.C. §103 (a).

CONCLUSION

Claims 21, the only independent claim under consideration, defines over the Mucher et al '830 patent under both 35 U.S.C. §102(b) and 103(a) and over the Blyth et al '550 patent under 35 U.S.C. §103(a). Claim 21 is accordingly allowable. It follows that dependent claims 22-27 are also allowable. The final rejection of the claims should accordingly be withdrawn and the application passed to issue.

Respectfully submitted,

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APPENDIX

21. A bedliner for a vehicle comprising in combination:
a first base layer;
a patterned second layer secured to the first base layer; and
a clear third layer secured to the patterned layer for permitting the patterned layer to be viewed.
22. The liner of claim 21 in which the base layer is a foam layer.
23. The liner of claim 21 in which the patterned layer is polychromatic.
24. The liner of claim 21 in which the patterned layer is monochromatic.
25. The liner of claim 21 in which the liner is relatively flexible.
26. The liner of claim 21 in which the liner is relatively inflexible.
27. The liner of claim 21 which includes a clear fourth layer on the clear third layer.



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TRANSMITTAL FORM <i>(to be used for all correspondence after initial filing)</i>	Application Number	10/077,346
	Filing Date	2/14/02
	First Named Inventor	RAYMOND ZAPPE
	Group Art Unit	3612
	Examiner Name	HILLARY L. GUTMAN
Total Number of Pages in This Submission	Attorney Docket Number	0144

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TOTAL AMOUNT OF PAYMENT (\$160.00)

Complete if Known

Application Number	10/077,346
Filing Date	2/14/02
First Named Inventor	RAYMOND ZAPPE
Examiner Name	HILLARY L. GUTMAN
Group Art Unit	3612
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METHOD OF PAYMENT

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- Deposit Account Number
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- ☐ Charge Any Additional Fee Required Under 37 CFR 1.16 and 1.17
- ☐ Applicant claims small entity status. See 37 CFR 1.27
2. ☒ Payment Enclosed:
- ☒ Check ☐ Credit card ☐ Money Order ☐ Other

FEE CALCULATION

1. BASIC FILING FEE

Large Entity Fee Code (\$)	Small Entity Fee Code (\$)	Fee Description	Fee Paid
101 710	201 355	Utility filing fee	
106 320	206 160	Design filing fee	
107 490	207 245	Plant filing fee	
108 710	208 355	Reissue filing fee	
114 150	214 75	Provisional filing fee	

SUBTOTAL (1) (\$)

2. EXTRA CLAIM FEES

Total Claims	Extra Claims	Fee from below	Fee Paid
Independent Claims	-20** =	X	
Multiple Dependent	-3** =	X	

Large Entity Fee Code (\$)	Small Entity Fee Code (\$)	Fee Description
103 18	203 9	Claims in excess of 20
102 80	202 40	Independent claims in excess of 3
104 270	204 135	Multiple dependent claim, if not paid
109 80	209 40	** Reissue independent claims over original patent
110 18	210 9	** Reissue claims in excess of 20 and over original patent

SUBTOTAL (2) (\$)

**or number previously paid, if greater; For Reissues, see above

FEE CALCULATION (continued)

3. ADDITIONAL FEES

Large Entity Fee Code (\$)	Small Entity Fee Code (\$)	Fee Description	Fee Paid
105 130	205 65	Surcharge - late filing fee or oath	
127 50	227 25	Surcharge - late provisional filing fee or cover sheet	
139 130	139 130	Non-English specification	
147 2,520	147 2,520	For filing a request for ex parte reexamination	
112 920*	112 920*	Requesting publication of SIR prior to Examiner action	
113 1,840*	113 1,840*	Requesting publication of SIR after Examiner action	
115 110	215 55	Extension for reply within first month	
116 390	216 195	Extension for reply within second month	
117 890	217 445	Extension for reply within third month	
118 1,390	218 695	Extension for reply within fourth month	
128 1,890	228 945	Extension for reply within fifth month	
119 310	219 155	Notice of Appeal	
120 310	220 155	Filing a brief in support of an appeal	160.00
121 270	221 135	Request for oral hearing	
138 1,510	138 1,510	Petition to institute a public use proceeding	
140 110	240 55	Petition to revive - unavoidable	
141 1,240	241 620	Petition to revive - unintentional	
142 1,240	242 620	Utility issue fee (or reissue)	
143 440	243 220	Design issue fee	
144 600	244 300	Plant issue fee	
122 130	122 130	Petitions to the Commissioner	
123 50	123 50	Processing fee under 37 CFR 1.17(q)	
126 180	126 180	Submission of Information Disclosure Stmt	
581 40	581 40	Recording each patent assignment per property (times number of properties)	
146 710	246 355	Filing a submission after final rejection (37 CFR § 1.129(a))	
149 710	249 355	For each additional invention to be examined (37 CFR § 1.129(b))	
179 710	279 355	Request for Continued Examination (RCE)	
169 900	169 900	Request for expedited examination of a design application	

Other fee (specify) _____

*Reduced by Basic Filing Fee Paid

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